



American Civil Liberties Union

Testimony at an Oversight Hearing on
the Implementation of the USA PATRIOT Act:
Effect of Sections 203(b) and (d) on Information Sharing

Before the
Subcommittee on Crime, Terrorism and Homeland Security

of the

House Judiciary Committee

Submitted by

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April 19, 2005

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Chairman Coble, Ranking Member Scott and Members of the Subcommittee:

I am pleased to appear before you today on behalf of the American Civil Liberties Union and its more than 400,000 members, dedicated to preserving the principles of the Constitution and Bill of Rights, at this important oversight hearing concerning information sharing and sections 203(b) and (d) of the USA PATRIOT Act of 2001.¹

The Patriot Act was passed by Congress in 2001 just six weeks after the terrorist attacks of September 11. Although the act passed by wide margins, members on both sides of the aisle expressed reservations about its impact on fundamental freedoms and civil liberties. As a result, Congress included a “sunset clause” providing that over a dozen provisions will expire on December 31, 2005, if Congress does not act to renew them.

This hearing addresses two provisions of the Patriot Act that will expire if they are not renewed – sections 203(b) and (d). These provisions authorize sharing of information acquired in criminal investigations with intelligence agencies. Section 203(b) specifically authorizes sharing of criminal wiretap information, while section 203(d) provides general authority to share information acquired in criminal investigations “notwithstanding any other provision of law.”

The ACLU supports information sharing concerning terrorism to ensure investigators can and do “connect the dots” to prevent terrorist attacks, with appropriate safeguards required to protect civil liberties. The National Commission on Terrorist Attacks Upon the United States (“9/11 Commission”) found that, prior to September 11, 2001, intelligence and security agencies did not properly share information in a number of key instances. In most cases, there appears to have been no legal barrier preventing such sharing.

Nevertheless, uncontrolled sharing of criminal investigative information with intelligence agencies poses real risks to civil liberties. The most acute danger is that federal prosecutors and law enforcement agents will be transformed from law enforcement officials concerned with preventing and punishing criminal activities into a domestic spy network directed at unpopular religious and political organizations.

¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

Using criminal search warrants, wiretaps, and subpoenas, federal investigators can severely chill constitutionally-protected freedom of speech and association if they aggressively probe religious and political organizations on the basis of a criminal probe that is really only a pretext for an intelligence investigation.

Federal law gives the FBI and other agencies wide latitude in conducting criminal investigations. Those who have been mistakenly investigated by the federal government can attest that the investigation alone, even without any formal charges or accusations, can lead to the loss of a job, business, and reputation.

The intense focus of criminal money laundering and terrorism financing investigations on Muslim organizations, think tanks and charities since September 11 illustrates both the benefits and the dangers of wider information sharing. The Justice Department, in its recent report on the Patriot Act, states it has used section 203(b) “on many occasions . . . to track terrorists’ funding sources and identify terrorist operatives overseas.”² The danger is that intensive criminal investigations, if undertaken without a good faith basis for bringing criminal charges, will severely chill legitimate political, religious and academic activities.

A series of raids in Northern Virginia in March 2002 of non-profit organizations and private homes terrorized a community and targeted some of the most prominent and well respected Muslim organizations and citizens of the United States. No money laundering or terrorism financing charges have been brought against these organizations or their officers in over three years. Some federal officials have characterized the investigation as an “intelligence probe” designed to gather information rather than to enforce the law.

More meaningful judicial oversight could help preserve the benefits of information sharing while providing greater protection for civil liberties. Currently, the only protection for civil liberties for most criminal investigative information consists of Attorney General guidelines that provide little, if any, real protection against abuse.

Northern Virginia Raids: Criminal Investigation or Intelligence “Fishing Expedition”?

In a series of raids in March 2002 in Northern Virginia, federal agents seized confidential files, computer hard drives, books, and other materials from some of the most respected Islamic think tanks and organizations in the United States and raided the homes of many of the leaders involved in those organizations.

The search warrants targeted two entities whose main purpose involves activities at the core of the First Amendment: the Graduate School of Islamic Thought and Social Sciences (GSITSS), an institute of higher education, and the International

² United States Dep’t of Justice, *USA PATRIOT Act: Sunsets Report* (April 2005)

Institute of Islamic Thought (IIIT), an Islamic research institute and think tank, as well as the private homes of a number of their employees and scholars.

The warrants sought a number of First Amendment-protected materials that clearly lack any apparent connection to an investigation of money laundering or terrorism financing. These include:

- Any and all information or correspondence “referencing in any way” any individual or entity designated as a terrorist by the President of the United States, the United States Department of Treasury, or the Secretary of State,
- “Pamphlets, leaflets, booklets, video and audio tapes related to” any such individual or entity, and
- “All computers” and related equipment and software.³

Given the breadth of the search warrants, it is no surprise the agents seized thousands of documents and other items of First Amendment value, including books, binders, computer disks, scholarly manuscripts, audio and videotapes, and mail delivered while the search warrant was being executed. Agents even seized “Sunday school emergency forms.”⁴

Indeed, as the ACLU of Virginia pointed out in its amicus filing in this case, given the magnitude of the terrorism problem and its effect on the Islamic world, it would extremely surprising *not* to find documents “referencing in any way” terrorist organizations (such as by, for example, condemning the attacks of September 11) at any American institution studying contemporary Islam or engaging in advocacy on behalf of Muslim Americans.

A federal civil rights action filed by the family of Dr. Unus, an employee of the IIIT, includes several serious charges of wrongdoing during the simultaneous raid of their home. The complaint alleges that agents demanded entry with weapons drawn and without immediately identifying themselves as federal agents, did not allow Dr. Unus’ wife to review the search warrant, took items not specified in the warrant, handcuffed Dr. Unus’ wife and daughter for hours, and did not allow them to cover themselves as required by their faith.⁵

The raids sent shock waves through the Northern Virginia Muslim American community. The institutions targeted included some of the most established and well-respected Muslim American organizations and leaders, citizens of the United States who have lived in this country since the 1970’s. Would indictments soon show that established organizations like the GSITSS or the IIIT were really fronts for terrorism financing?

³ See Brief Amicus Curiae of the American Civil Liberties Union of Virginia, Inc., In Support of Motion for Return of Property and to Unseal the Search Warrant Affidavit, *In the Matter of the Search of 750A Miller Drive et al.*, No. 02-MG-122 (E.D. Va. 2002) (emphasis added), attached to this testimony as appendix A.

⁴ *Id.*

⁵ See Complaint in *Aysha Nudrat Unus and Hanaa Unus v. David Kane and Rita Katz*, Civ. No. 04-312-A (E.D. Va. filed Nov. 9, 2004) ¶¶ 47-63.

In a word: no. More than three years following the raids, there have been no criminal charges brought against the GSITSS, the IIIT, or any of their officers or directors. The GSITSS and the IIIT have not had their assets seized or funds frozen. No evidence has emerged that any of their assets were ever used to fund terrorism. All the files, computers and other property seized in the raids has been returned, although the government retains copies of them. The attorney for the GSITSS and the IIIT, Nancy Luque, has been told by the FBI that her clients are no longer under investigation for any terrorism financing or other terrorism-related charges.

The complaint in the civil rights action says the affidavit in support of the search warrants contained fabricated material facts regarding non-existent overseas transactions. The complaint also says the search warrant affidavit was drafted with the help of private author and self-styled “terrorist hunter” Rita Katz, who was paid \$272,000 for her advice by the federal government and has made much more in a book deal and as a consultant for news organizations.⁶ According to federal investigators, Katz “lost the trust of some investigators from the FBI and Justice Department” as a result in part of the “reckless conclusions” she drew in her book.⁷

According to the *Washington Post*, federal officials have sought to justify the raids “as an ‘intelligence’ probe, designed not necessarily to yield criminal charges but to track possible terrorist activity.”⁸ This justification strongly suggests that the material seized in the March 2002 raids has been copied and shared with intelligence agencies under section 203(d) of the Patriot Act. As a result of amendments made to section 203(d) of the Patriot Act by the Homeland Security Act,⁹ the material may also have been shared with the intelligence agencies of foreign governments. As a result, it is at least possible the intelligence agencies of Syria, Saudi Arabia, or Egypt have been given some or all of the confidential files of the IIIT or the GSITSS, whose officers, directors and scholars have included prominent dissidents and scholars who seek to integrate Islam with an agenda for democratic reform. For example, Dr. Jamal Barzingi, a member of the board of the IIIT, prominent Muslim scholar and Iraqi-American, is a leading advocate of democratic reform. Dr. Barzingi was invited to advise the Iraqi Governing Council following the toppling of Saddam Hussein’s regime in 2003.

⁶ See *id.* ¶¶ 12-34.

⁷ See Marc Perelman, *Muslim Charities Sue CBS, Investigator*, The Forward, June 13, 2003.

⁸ Jerry Markon, *Affidavit Unsealed From Muslim Probe*, Washington Post, Aug. 1, 2003, at A6.

⁹ Homeland Security Act of 2002, § 897, Pub. L. No. 107-296, 116 Stat. 2135, 2257-58 (codified at 50 U.S.C. § 403-5d). Section 897 amends the general authority for sharing of criminal investigative information, such as the fruits of the search warrants executed in Northern Virginia, to include “any appropriate Federal, State, local, or *foreign government official*” See *id.* (emphasis added). The standards are somewhat narrower than for disclosure to United States intelligence agencies. Other provisions of the Homeland Security Act extend sections 203(a) and (b) to authorize the sharing of grand jury information and the fruits of criminal electronic surveillance with the intelligence agencies of foreign governments. See *id.* at §§ 895, 896.

The raids in Northern Virginia did not affect only the Muslim community. The search warrants also included authorization to search the offices of Mar-Jac Poultry, Inc., a Gainesville, Georgia chicken processing company that produces halal chicken – chicken prepared under Islamic law. The search warrants were approved in the Eastern District of Virginia under the new nationwide search warrant power authorized by section 219 of the Patriot Act. Mar-Jac Poultry is a longstanding poultry business founded in 1948. It currently employs 1200 workers. No charges have been brought against Mar-Jac or any of its employees in over three years, but its reputation in the community has suffered a severe blow as a result of the raids and attendant publicity.¹⁰

In a landmark case in 1965, the Supreme Court considered a criminal search warrant allowing the seizure of “any books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or any written instruments concerning the Communist Party of Texas and the operations of the Communist Party of Texas.”¹¹ The Supreme Court struck down the warrant, saying search warrants should be “accorded the most scrupulous exactitude when the ‘things’ are books, and the basis for their seizure is the ideas they contain.”¹²

As the Supreme Court has observed, “The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.”¹³ The use of criminal investigative powers for intelligence-gathering “fishing expeditions” poses real dangers to civil liberties.

Should Congress Reauthorize Section 203(b) and (d)?

Before re-authorizing any expiring power, this subcommittee should require the Executive Branch to meet the standard articulated by the bipartisan 9-11 Commission:

- First, Congress should examine the provisions to determine whether the government can show “(a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive’s use of the powers to ensure protection of civil liberties.”¹⁴
- Second, “[i]f the power is granted, there must be adequate guidelines and oversight to properly confine its use.”¹⁵

Only an intensive and painstaking process of examining the facts regarding the use of these powers can answer these questions.

¹⁰ See Bill Torpy, *Poultry Company Sues CBS over Terrorism Story*, Atlanta Journal-Constitution, July 6, 2003.

¹¹ *Stanford v. Texas*, 379 U.S. 476, 486 (1965).

¹² *Id.* at 485.

¹³ *Marcus v. Search Warrants of Property at 104 East Tenth St.*, 367 U.S. 717, 729 (1961).

¹⁴ Final Report of the National Commission on Terrorist Attacks Upon the United States (“The 9/11 Commission Report”) 294-95 (2004) (boldfaced recommendation)

¹⁵ *Id.*

Until now, the government has fallen short on specifics. For example, the discussion of sections 203(b) and (d) in the Justice Department's "sunsets reports" does not describe any specific cases.¹⁶ Just last week, Senate Judiciary Chairman Arlen Specter expressed frustration at the Justice Department's inability to provide specific facts about the Patriot Act even in a classified setting. "This closed-door briefing was for specifics," Senator Specter explained. "They didn't have specifics."¹⁷

The Justice Department claims civil liberties are adequately protected by Attorney General guidelines governing the sharing of criminal grand jury and wiretap information mandated by section 203(c) of the Patriot Act (a provision not subject to the sunset provision).¹⁸ These guidelines require information concerning United States persons to be labeled and treated in accordance with Executive Order 12333, which authorizes the intelligence community to "collect, retain or disseminate" information about U.S. persons where such information meets the definition of "foreign intelligence or counterintelligence" as well as for a host of other reasons.¹⁹ As section 203 of the Patriot Act authorizes sharing specifically of foreign intelligence and counterintelligence information, it is not clear what, if any, additional protection the Attorney General guidelines provide.

If the government can show that sections 203(b) and (d) "actually materially enhance[] security," the danger to free expression from the misuse of criminal powers points to the need for stricter supervision of the Executive Branch than is provided by the guidelines.

Section 203(a) of the Patriot Act permits sharing of otherwise confidential "matters occurring before the grand jury" with intelligence officials, but also requires notice to the court "[w]ithin a reasonable time after such disclosure" Section 203(a) is not subject to the sunset clause.

The notice requirement of section 203(a) should be broadened from grand jury information to include all criminal investigative information shared with intelligence agencies, and notice should be made more meaningful. For example, notice to the court should include a statement of the good faith basis for the criminal investigation and provide some update as to the progress of that investigation. The notice should also be supplemented with a report on the disposition of the criminal investigation if no charges are brought. Such a requirement will serve as a valuable check on abuse of the criminal process for intelligence "fishing expeditions."

¹⁶ See sunsets report, *supra* n. 2.

¹⁷ Eric Lichtblau, *Specter Voices Frustration Over Briefing on Patriot Act*, N.Y. Times, Apr. 13, 2005.

¹⁸ Memorandum of the Attorney General, Guidelines for Disclosure of Grand Jury and Electronic, Wire and Oral Interception Information Identifying United States Persons, Sept. 23, 2002, available at: http://www.usdoj.gov/olp/section_203.pdf

¹⁹ Exec. Order 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981) (set out as a note following 50 U.S.C.A. § 401), at § 2.3

A stronger notice requirement could also aid in Congressional oversight. Congress should consider reauthorizing some provisions of the Patriot Act, including sections 203(b) and (d), for some additional period of time, rather than making them permanent. Congress could include reporting requirements that would provide it with the same information a stronger notice requirement would provide to the federal courts.

Conclusion

This subcommittee's review of the Patriot Act and related legal measures in the ongoing effort to combat terrorism is needed to ensure continued public support for the government's efforts to safeguard national security. The controversy over the Patriot Act reflects the concerns of millions of Americans for preserving our fundamental freedoms while safeguarding national security. To date, resolutions in opposition to parts of the Patriot Act and other actions that infringe on fundamental rights have been passed in 377 communities in 43 states including five state-wide resolutions. These communities represent approximately 56.9 million people who oppose sections of the Patriot Act.

Such widespread concern, across ideological lines, reflects the strong belief of Americans that security and liberty need not be competing values. Congress included a "sunset provision" precisely because of the dangers represented by passing such far-reaching changes in American law in the aftermath of the worst terrorist attack in American history. Now is the time for Congress to complete the work it began when it passed the Patriot Act, by bringing the Patriot Act back in line with the Constitution.

I thank you for this opportunity to testify and look forward to taking any questions you may have.